In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 189

E. B. ENGEL,
Petitioner,
vs.
J. O. DAVENPORT, et al.,
Respondents.

REPLY BRIEF FOR PETITIONER.

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We apologize for the absence of an Index in our first brief, the absence was caused by the fact that the new rules of the court do not appear to have arrived on this side of the continent when it was printed.

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I.

The case on review herein is *Engel v. Davenport,* 194 Cal. 344. The Supreme Court of the State of California decided two things in that case, to-wit:

First. By what is apparently very clear reasoning, that it had jurisdiction over the subject matter of the action.

Second. It concedes, for the purpose of argument, that the two-year federal statute of limitations would apply if the action had been brought in a federal court,

but that the state statute of limitations applied because the action was brought in the state court. (Pages 350-351.) In other words, that when Congress legislates it does not legislate for all courts.

Respondent admits as follows, on page 26 of his brief:

> "And we further concede that Acts of Congress, upon those subjects, are binding on the state courts."

So the question in this case appears to be: What did Congress do? We believe we fully pointed that out in our brief, but other questions have been presented in respondents' brief, which we will take up.

II.

THIS CASE IS WITHIN THE TERMS OF THE JONES ACT.

First, we beg to state that we do not understand the reasoning of counsel for respondents, that there is a difference between unseaworthiness and negligence, as our mind is so constructed that we fail to comprehend how a vessel can be sent to sea in an unseaworthy condition and not be defective or insufficient, hence negligently sent.

The last part of Section 1 of the Federal Employers' Liability Law reads:

> "or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

It will certainly be very difficult to construe an unseaworthy vessel out of that language. But the com-

plaint herein reads (paragraph V, page 2, of Transcript):

> "* * * and the appliances on said vessel were defective in this, that there was on board of said vessel and necessary to be used in carrying said cargo of lumber, an appliance called a chain lashing upon which chain lashing there was a necessary part thereof a hook called a pelican hook, that during the times herein stated said pelican hook was defective in this, that it had a flaw therein which was observable upon ordinary inspection, but no inspection was made of said hook by defendants or any thereof, * * * the said pelican hook broke by reason of the flaw aforesaid * * *"

We submit that language brings the case within Sec. 1 of the above act.

III.

THE STATE COURT HAD JURISDICTION OVER THE SUBJECT MATTER.

It is elementary that a court of general jurisdiction has jurisdiction over all matters, unless its jurisdiction *is expressly excluded.* This court said, in

> *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 159, 161:
>
> "Also it should be noted that federal laws are constantly applied in state courts; *unless inhibited their duty* so requires. Cons. Ar. VI, Clause 2, 2nd Employers Liability cases, 223 U. S. 1, 55."

In the last mentioned case, this court held that state courts had jurisdiction over cases arising under this same act.

Manchester v. Massachusetts, 119 U. S. 240, 263.

"personal suits on maritime contracts or for maritime torts can be maintained in the state courts."

The Hamilton, 207 U. S. 404.

"leaves open the common law jurisdiction of the state courts over torts committed at sea. This we believe has always been admitted." (Cases cited.)

Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 123;

Carlisle Packing Co. v. Sandanger, 259 U. S. 255;

Larson v. Alaska Packers Association, 96 Wash. 665;

Rosenberg v. Frank, 58 Cal. 387, 403;

Dawson v. Superior Court, 13 Cal. App. 582-3;

Faras v. Lower Cal. Dev. Co., 27 Id. 688;

Lynott v. Great Lakes Trans. Co., 202 N. Y. App. Div. 613;

Tammis v. Panama Ry. Co., Id. 226.

Both of the last cited cases are upon this same act, and on page 233 we find the following quotation from *Plaquemines Fruit Co. v. Henderson*, 170 U. S. 511, 517, in which this court said:

"If it was intended to withdraw from the states authority to determine by its (sic) courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, *such a purpose would have been manifested by clear language.*"

People v. Welch, 141 N. Y. 266.

Respondents rely entirely upon the language in Sec. 33 of the Jones Act, as follows:

"Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is situated."

That language is broad enough to cover state courts, but this court held in

Panama Ry. Co. v. Johnson, 264 U. S. 375,

that that language only applied to *venue,* thus compelling an action to be brought where the employer had his office or residence, instead of any where he might do business, as the Railway Employers' Liability Act permitted, and the Appellate Division of New York held likewise in the above cases of *Lynott v. Great Lakes Trans. Co.,* and *Tammis v. Panama Ry. Co.,* 202 Appellate Division 226, 613.

A state court can just as readily be "the court of the district" as a United States court can, and the language simply fixes the place of trial, and does not divest previously vested jurisdiction of courts.

IV.

SEVERAL OF THE CASES CITED BY RESPONDENT HAVE BEEN OVERRULED.

Malia v. Southern Pacific Co., 293 Fed. 902, and *Atianza v. United States Shipping Board,* E. F. C., 299 Fed. 975, both decided by Judge Garvin were overruled by him in *Atianza v. United States Shipping Board,* E. F. C., 3 Fed. (N. S.) 845. And he therein disagrees with *Wenzler v. Robins Line S. S. Co.,* 277 Fed. 812, therein, as had Judge Hand previously.

The latter case and *Prieto v. U. S. Shipping Board,* 193 N. Y. S. 342, page 27 of Respondents' Brief, and *Nox v. United Shipping Board,* 193 N. Y. S. 340, cited on page 29 of said brief, are each disagreed with in *Lynott v. Great Lakes Transit Co.,* 202 N. Y. App. Div. 619-620. And the *Nox* and *Prieto* cases, in *Tammis v. Panama Ry. Co.,* 202 N. Y. App. Div. 234.

V.

THERE IS NO REASON FOR THE CONFUSION OF OPINIONS ON THIS LAW.

What Congress intended is clear, that is, place seamen just where railway employers were, and are, and the words "all statutes of the United States" are as this court said in the *Panama Railway Co. v. Johnson* case words of reference, the words could not be more comprehensive, or easier to understand. As we said in our opening brief most of the confusion arises from the *Wenzler Robins Line S. S. Co.* case, and we respectfully submit that the court in that case failed to give any effect to the above words "all statutes," when effect should have been given to those words with the rest of the language. If Congress had not intended "all statutes " it would have used the language, "all those parts of all statutes".

VI.

A UNITED STATES COURT ONLY APPLIES STATE STATUTES OF LIMITATION BY ANALOGY.

That is, if there is a federal statute it applies that, in the absence of congressional legislation analogy is used, but never where there is a United States statute, as if there is a federal statute, it is impossible to apply the doctrine of analogy and the law of the forum cannot apply when Congress has legislated on the subject.

We respectfully submit that all the best reasoning on Section 33 is with our contention and it is detrimental to everyone interested in shipping matters for the present confusion of decisions to remain, and that judgment should go accordingly.

Dated, San Francisco,
January 16, 1926.

Respectfully submitted,
H. W. HUTTON,
Attorney for Petitioner.